

No. DA 10-0126

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SCOTT RICHARD ALBRIGHT,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable John C. Brown, Presiding

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STATEMENT OF THE ISSUE

1. Did the District Court err when it gave the instruction of “knowingly”?
2. Did the District Court err when it refused Albright’s timely request for a jury instruction on the lesser-included offense of negligent endangerment?

STATEMENT OF THE CASE AND FACTS

On February 27, 2009, Defendant/Appellant Scott Richard Albright (Albright) accidentally discharged the handgun he kept for protection in his apartment in Belgrade. (Tr. at 308, 462.) The spent casing from the bullet was found near his bedroom door. (Tr. at 268, 490, 493.) Albright was drinking tequila, and was moving about the apartment watching the television as he prepared for bed in the adjoining bedroom, which included removing his gun from underneath his pillow and placing it on the nightstand next to his side of the bed. (Tr. at 454, 461, 508, 510.)

Albright does not know precisely how the gun discharged. (Tr. at 308, 457, 509-10.) During investigation of the discharge, he consistently maintained the discharge was an accident. (Tr. at 331, 362, 448, 454, 457-58, 507.) He could not recall if the gun discharged while he was standing in the bedroom or the living room. (Tr. at 448, 454, 457.) The location of the spent casing indicated it was in the threshold between the two rooms. (Tr. at 368, 493, 519.) Albright went to bed,

and the next thing he knew, the alarms were sounding, indicating someone had breached the door to his apartment and business below. He went out to his stairwell, and discovered the police. (Tr. at 249, 267-68.)

Albright and his wife, May, were both brought in for questioning in the course of the investigation. (Tr. at 236.) On March 23, 2009, the State charged Albright with Criminal Endangerment (felony). (D.C. Doc. 3.) The matter proceeded to jury trial commencing November 16, 2009. (D.C. Doc. 64.) During settlement of jury instructions, over objection, the court denied Albright's instruction for "knowingly," and denied his request for an instruction on the lesser-included offense of Negligent Endangerment. On November 18, 2009, at the conclusion of a three-day trial, the jury found Albright guilty as charged. (Tr. at 645.) On January 13, 2010, the district court sentenced Albright to ten years with the Department of Corrections, five years suspended, with 321 days credit for time served. (Tr. at 21-24, D.C. Doc. 79.) Albright appeals his conviction and sentence.

SUMMARY OF THE ARGUMENT

The district court erred when it gave the instruction on "knowingly." The district court's instruction impermissibly relieved the State of its burden of proof. In accordance with this Court's holding in *State v. Lambert*, 280 Mont. 231, 929 P.2d 846 (1996), this Court should again hold that the particular effect of the

district court's issuance of the errant instruction is a violation of due process rights as provided by Article II, Section 17 of the Montana Constitution, and is therefore reversible error.

The district court erred when it denied the proposed instruction regarding negligent endangerment as a lesser-included offense of felony criminal endangerment. Evidence was elicited through cross-examination that Albright had been cycling rounds through the chambers the night before, and that it was possible for a bullet to have remained in the chamber without Albright's knowledge. (Tr. at 523-31.) Additionally, evidence was elicited demonstrating that Albright had never waived from his defense that the discharge was accidental. (Tr. at 331, 362, 448, 454, 457-58, 507.) The district court misapprehended the law of lesser-included offenses, and the case should be remanded for a new trial with the addition of the denied instruction.

STANDARD OF REVIEW

This Court reviews jury instructions to determine whether the instructions, taken as a whole, fully and fairly instruct the jury as to the applicable law and whether the district court abused its discretion in instructing the jury. If the instructions are erroneous in some aspect, the mistake must prejudicially affect the defendant's substantial rights in order to constitute reversible error. *State v. Gerstner*, 2009 MT 303, ¶ 15, 219 P.3d 866 (citations omitted).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT GAVE THE WRONG INSTRUCTION OF “KNOWINGLY.”

During settlement of jury instructions, the district court refused Albright’s offered instruction, and accepted the erroneous instruction offered by the State. (Tr. at 561-66.) The State erroneously advised the district court that criminal endangerment is not a result-oriented crime, and that the State only needed to prove Albright had awareness of his conduct. (Tr. at 561.)

In direct opposition to the contentions of the State, this Court held in *Lambert*, that the improper “knowingly” jury instruction given for precisely the same charge was reversible error. This Court stated,

Our reading of the criminal endangerment statute is that it emphasizes result over conduct. The portion of the statute that we are reviewing here does not particularize the conduct that, if engaged in, results in the commission of the offense. Rather, a person may engage in a wide variety of conduct and still commit the offense of criminal endangerment, provided that the conduct creates a substantial risk of death or serious bodily harm. It is the avoidance of this singular result, the risk of death or serious harm, that the law attempts to maintain.

There being no particularized conduct which gives rise to criminal endangerment, applying to that offense’s mental element the definition of “knowingly” that an accused need only be aware of his conduct is incorrect. *It is the appreciation of the probable risks to others posed by one’s conduct that creates culpability for criminal endangerment; were it otherwise, where culpability could lie for mere appreciation of one’s conduct, such as driving a car or shooting a hunting rifle, some very unfair results could follow.*

In our view, the relevant statutory scheme recognizes and addresses these concerns. As Lambert points out, § 45-2-101(34), MCA, provides on the one hand that “a person acts knowingly with respect to conduct . . . described by a statute defining an offense when the person is aware of the person’s own conduct . . .”, and provides on the other hand that “[a] person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person’s conduct.” Conduct is not described by § 45-5-207(1), MCA, but the result of conduct is: “a substantial risk of death or serious bodily harm.”

In addition, § 45-2-103(4), MCA, explains that “if the statute defining an offense prescribes a particular mental state with respect to the offense as a whole without distinguishing among the elements of the offense, the prescribed mental state applies to each element.” The criminal endangerment statute provides that the mental state “knowingly” applies, without apparent distinction, to the elements (1) engage in conduct (2) that creates a substantial risk of death or serious bodily harm to another. According to § 45-2-103(4), MCA, “knowingly” applies to both conduct and the result of that conduct.

We conclude that the “knowingly” element of criminal endangerment contemplates a defendant’s awareness of the high probability that the conduct in which he is engaging, whatever that conduct may be, will cause a substantial risk of death or serious bodily injury to another.

We hold that the District Court incorrectly applied as the mental element of the offense of criminal endangerment the definition of “knowingly” that a defendant need only be aware of his conduct. We also hold when the District Court relied on this misinterpretation of the law in denying Lambert’s motion for acquittal and in instructing the jury, the court committed reversible error. The general effect of the court’s misinterpretation, manifest in the two rulings complained of, was to alter the State’s burden of proving beyond a reasonable doubt the elements of the offense: to prove that a defendant was aware of his conduct is one thing; to prove that he was aware of the high probability of the risks posed by his conduct is quite another. **The particular effect of the**

court's interpretation is a violation of due process rights as provided by Article II, Section 17 of the Montana Constitution.

Lambert, 280 Mont. at 236-37, 929 P.2d at 849-50 (emphasis added).

It is clear from this Court's analysis in *Lambert*, that the district court erred. The district court provided the State's offered instruction over objection from Albright. (Tr. at 566.) The effect of providing the wrong definition of "knowingly" in the jury instructions was to relieve the State of its burden in proving every element of criminal endangerment, specifically, that Albright was aware of the high probability that handling his gun would cause death or serious bodily injury to his neighbors. As this Court held in *Lambert*, the grant of the erroneous "knowingly" instruction is a violation of due process rights as provided by Article II, Section 17 of the Montana Constitution. Consequently, this Court must find reversible error and remand for retrial.

II. THE DISTRICT COURT ERRED WHEN IT REFUSED ALBRIGHT'S TIMELY REQUEST FOR A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF NEGLIGENT ENDANGERMENT.

During settlement of jury instructions, Albright requested the district court instruct the jury that negligent criminal endangerment was a lesser-included offense of criminal endangerment. (Tr. at 566.) Albright argued that based on the evidence presented at trial, the jury could find that the accidental discharge was caused by a conscious disregard of the risk to others (the test for "negligently"),

because he did not confirm the status of bullets in the chamber. (Tr. at 567, 572.)

The district court refused Albright's proposed jury instruction on negligent criminal endangerment. (Tr. at 597.) The district court erred when it refused Albright's proposed instruction.

In *Feltz*, this Court held that lesser-included offense instructions "must be given when there is a proper request by one of the parties, and the jury, based on the evidence, could be warranted in finding the defendant guilty of a lesser included offense," rather than the greater offense. This Court further held that a defendant is entitled to a lesser-included offense instruction if two criteria are met: (1) the offense must constitute a lesser-included offense as defined by Mont. Code Ann. § 46-1-202(9), and (2) there must be sufficient evidence to support an instruction on the lesser-included offense. *State v. Feltz*, 2010 MT 48, ¶ 17, 355 Mont. 308, 227 P.3d 1035. This Court then cited precedent explaining the rule:

The purpose of this rule is to ensure reliability in the fact-finding process. It avoids the situation where the jury, convinced that the defendant is guilty of some crime, although not necessarily the crime charged, **convicts the defendant rather than let his action go unpunished simply because the only alternative was acquittal.** *State v. Castle*, 285 Mont. 363, 367, 948 P.2d 688, 690 (1997) (citing *State v. Gopher*, 194 Mont. 227, 230, 633 P.2d 1195, 1197-98 (1981)).

Feltz, ¶ 17 (emphasis added).

Pursuant to Mont. Code Ann. § 46-1-202(9)(a), an included offense is one that “is established by proof of the same or less than all the facts required to establish the commission of the offense charged.” As referenced in the statute, “facts” are the statutory elements of the offenses, not the specific facts of a case. *Feltz*, ¶ 18, citing *State v. Matt*, 2005 MT 9, ¶ 13, 325 Mont. 340, 106 P.3d 530, quoting *State v. Beavers*, 1999 MT 260, ¶ 30, 296 Mont. 340, 987 P.2d 371. This court further analyzed an included offense in *Feltz*:

The definition of included offense contained in § 46-1-202(8)(c), MCA, is written in the disjunctive and with an “only” qualifier. Thus, an included offense may differ from the offense charged by way of a less serious injury or a less serious risk or a lesser kind of culpability. In other words, an offense is an included offense under § 46-1-202(8)(c), MCA, if it differs from the charged offense in one, *but only one*, of the three ways set forth in the subsection. This careful drafting permits an offense which differs from the charged offense in only one significant respect regarding degree to be an included offense; at the same time, it prevents the “inclusion” of offenses which differ sharply in several respects from the charged offense.

State v. Fisch, 266 Mont. 520, 523, 881 P.2d 626, 628 (1994) (emphasis added).

A person commits the offense of criminal endangerment, in violation of Mont. Code Ann. § 45-4-207, when he “knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another.” A person commits the offense of negligent endangerment, in violation of Mont. Code Ann. § 45-5-208(1), when he “negligently engages in conduct that creates a substantial risk of death or serious bodily injury to another.” Therefore, pursuant to this Court’s

analysis in *Fisch*, negligent endangerment is a lesser-included offense of criminal endangerment because it requires *only* a lesser degree of culpability.

The evidence received by the jury permitted it to infer that Albright negligently handled the gun by not checking the status of bullets in the chamber, and consciously disregarded the creation of a substantial risk of death or serious bodily injury by so doing. The district court erred in not providing the lesser-included instruction and thereby ensuring reliability in the fact-finding process. To-wit, the jury as the fact-finder was required by statute to contemplate and determine the answer to the following: *Did Albright know at the time he handled his gun, that a bullet discharging through the common wall would probably result from his conduct, or did he simply act with a conscious disregard for the possibility that this result could occur?*

The State argued to the district court, that if Albright maintained it was an accident, he could not be charged with negligent endangerment:

MR. KITZMILLER: The Defendant, through his statements to law enforcement, has been claiming that this was an accidental discharge. Now, it sounds like just a dealing of semantics, but an accident is not negligence in the eyes of the criminal law. Negligence as defined under the criminal statute is when someone conscientiously [sic] disregards the risk of the outcome of his actions. Okay. That's not an accident. An accident is sort of like an Act of God, you just didn't know. You can't conscientiously [sic] disregard something that you didn't know. As I understand what Mr. Albright is saying, he didn't know the gun was loaded. He didn't - - I mean, it just accidentally - - I think a couple statements that have been admitted is the gun just went off without any real involvement on his behalf. A couple times he

said, maybe my finger was on the trigger or something like that, but there's been no evidence been presented to this Court that the Defendant conscientiously [sic] disregarded the risk of the outcome of his actions when he decided to discharge a firearm. His theory of the case here has been presented through his statements to law enforcement that this is an accident. An accident, in my mind, doesn't rise to the definition of negligence in the eyes of the law, even - - because you might be able to make that argument in a civil case, but we're talking about a criminal degree of negligence which is even beyond the element of negligence in a civil case. So - go ahead.

(Tr. at 573.)

The district court discussed with the State the evidence that supported a determination to grant the request to give the jury the lesser-included instruction:

THE COURT: All right, so Mr. Kitzmiller, I believe one of the - - I believe it was Detective Lensing today who when Ms. Cairns, or I guess, actually when you had asked him about statements made by Mr. Albright during his interview, but I believe at some point that, you know - - excuse the Court's profanity or the repetition of the profanity - -

MR. KITZMILLER: I know where you're going with that.

THE COURT: - - but when Mr. Albright said that he, fucked up.

MR. KITZMILLER: Um hum (yes).

THE COURT: All right. Now, isn't that some kind - - doesn't - - couldn't - - that be considered evidence that he did - - it didn't just go off, that he, in fact, did it - - that there was some conscious act on his part? **Couldn't the jury infer from that statement?**

(Tr. at 573-74.)

The dispute between the district court and the State centers around Albright's claim that the discharge was an accident, and the inference the jury could make by his statement that he "fucked up" by not verifying the status of bullets in the chamber. Notably, the district court based its erroneous decision on a misapprehension of the law as discussed in *State v. Martinez*, 1998 MT 265, 291 Mont. 265, 968 P.2d 705. The district court concluded that because Albright maintained the discharge was an accident, then a jury instruction on the lesser-included offense of negligent endangerment would preclude the jury finding Albright innocent of the criminal endangerment, and prevent Albright's acquittal. The district court, addressing its concerns over the requested instruction, stated to Albright:

See, I mean, and that's where, and I understand counsel, and it's actually a very interesting question, but the part that concerns me about *Martinez* - - I'll go back to it again - - is that if your theory is correct and it means acquittal, then it's actually - - then it would be error to give the lesser included instruction because then I'm making them - - forcing the jury's hand to find him guilty of the lesser included offense when really it's an all or nothing deal and they should acquit him. Do you see what I'm saying? It's - - it would be an error to Mr. Albright's disadvantage if I did that. Now, do you want to - -

(Tr. at 591.)

By statute, the district court in this case was required to instruct the jury on the lesser-included offense of negligent endangerment because the jury, based on the evidence, could just as well have found that Albright acted with a conscious disregard of the risk that his conduct presented to others, as it could have found that he was aware of a high probability of risk to others. This is precisely what this Court addressed in *Gopher, Castle, and Feltz*, when it held:

The purpose of this rule is to ensure reliability in the fact-finding process. It avoids the situation where the jury, convinced that the defendant is guilty of some crime, although not necessarily the crime charged, **convicts the defendant rather than let his action go unpunished simply because the only alternative was acquittal.**

Feltz, ¶ 17 (emphasis added).

This Court should remand for a new trial with instructions to the district court that it must accept and provide to the jury the instruction of the lesser-included offense of negligent endangerment.

CONCLUSION

The district court erred when it provided the wrong instruction to the jury regarding “knowingly” as it pertains to the charge of criminal endangerment. This Court has held that the application of Mont. Code Ann. § 45-2-103(4) to the criminal endangerment statute provides that the mental state “knowingly” applies, without apparent distinction, to the elements (1) engage in conduct (2) that creates

a substantial risk of death or serious bodily harm to another. The effect of the errant instruction was to relieve the burden of the State to prove beyond a reasonable doubt each element of the charge, thereby depriving Albright of his constitutional due process rights in violation of Article II, Section 17 of the Montana Constitution.

The district court also erred when it refused to provide the instruction on the lesser-included offense of negligent endangerment. Pursuant to the statutory scheme laid forth above, negligent endangerment is a lesser-included offense of criminal endangerment, and sufficient evidence was presented to the jury for it to find that Albright consciously disregarded the risk of death or bodily injury to others when he handled his gun without checking to see that the chamber was empty. By refusing to provide the instruction on the lesser-included offense of negligent endangerment, the district court placed the jury in precisely the position this Court described in its explanation of the rule requiring lesser-included instructions. The jury was forced to choose between acquittal or criminal endangerment, because it was forbidden to apply the facts before it and conclude Albright was negligent. This Court must remand for retrial with an order to include the negligent endangerment instruction and the proper jury instruction for “knowingly.”

Respectfully submitted this ____ day of June, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

Sarah Chase Rosario y Naber

APPENDIX

Sentencing Order.....Exhibit A

Oral Pronouncement of Sentence.....Exhibit B